Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
Joint Petition Filed by Dish Network, LLC, The United States of America, and the States of California, Illinois, North Carolina, and Ohio For Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules	)	CG Docket No. 11-50
Petition Filed by Philip J. Charvat for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules	)	
Petition Filed by Dish Network, LLC for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules	)	

COMMENTS OF DISH NETWORK, LLC

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May 4, 2011

TABLE OF CONTENTS

Page

SUMMARY

The *Public Notice* asks for comment on the following questions:

> (1) Under the TCPA, does a call placed by an entity that markets the seller's goods or services qualify as a call made on behalf of, and initiated by, the seller, even if the seller does not make the telephone call (i.e., physically place the call)?; and
>
> (2) What should determine whether a telemarketing call is made "on behalf of" a seller, thus triggering liability for the seller under the TCPA? Should federal common law agency principles apply? What, if any, other principles could be used to define "on behalf of" liability for a seller under the TCPA?

The first question should be answered with a resounding "no." The TCPA was designed, and is jurisdictionally limited to, reaching the actual users of the telephone equipment. The liability provisions of the statute are directed toward a business or person that places its own unlawful calls, or a call center that places unlawful calls. These provisions do not create liability for a business or person that does not use telephone equipment. These provisions also do not extend liability to a business that authorizes an independent third party to generally market its products or services where that third party initiated an unlawful call.

The Commission's implementing regulations also do not provide for broad, unfettered indirect liability to any party that has a nexus (however close or distant) with another who violates the TCPA and/or its implementing regulations. Consistent with the jurisdictional reach of and the authority conferred on the FCC by the TCPA, the regulations promulgated by the Commission provide for liability for the initiator of the call. There is no basis – whether legal authority or common sense – to adopt the attenuated, unsupported, and impractical

arguments suggested by the Government Movants[1] or the plaintiff, Phillip Charvat, in *Charvat v. EchoStar Satellite, LLC*, No. 09-4525. ("Charvat").

With respect to the second question that the FCC requested comment on, if the Commission concludes that the TCPA permits some type of indirect liability (which it should not), the federal common law of agency is the only practical standard to define the scope of such liability. This standard requires an analysis of whether the alleged principal directed and controlled the alleged agent's unlawful telemarketing. Using this standard would be consistent with how courts routinely interpret federal statutes that provide for indirect liability, but do not articulate a standard for applying such liability. Applying the federal common law of agency also would promote uniformity in the interpretation and application of the TCPA, both by the Commission and judiciary in matters involving the TCPA.

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[1] "Government Movants" collectively refers to the States of California, Illinois, North Carolina, and Ohio (the "States") and the United States Department of Justice.

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COMMENTS OF DISH NETWORK, LLC

Dish Network, L.L.C. ("DISH"), through its undersigned counsel, respectfully submits these comments in response to the Federal Communications Commission's ("FCC" or the "Commission") *Public Notice*, dated April 4, 2011, requesting guidance on the circumstances under which a person or entity is liable for telemarketing violations committed by dealers or other third parties.[1]

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[1] *Public Notice*, Consumer and Governmental Affairs Bureau Seeks Comment on the *Joint Petition Of Dish Network, LLC And The United States, The States Of California, Illinois, North Carolina, And Ohio For An Expedited Clarification Of And Declaratory Ruling On The Telephone Consumer Protection Act of 1991*; the *Petition Filed by Philip J. Charvat for Declaratory Ruling Concerning the Telephone Consumer Protect Act (TCPA) Rules;*

I. UNDER THE TCPA, A CALL PLACED BY AN ENTITY THAT MARKETS THE SELLER'S GOODS OR SERVICES DOES NOT, AND CANNOT, QUALIFY AS A CALL MADE ON BEHALF OF, AND INITIATED BY, THE SELLER

The *Public Notice* requests comment on whether, under the TCPA, a call placed by an entity that markets the seller's goods or services qualifies as a call made on behalf of, and initiated by, a seller, even if the seller does not make the telephone call (*i.e.*, physically place the call). The answer to this question is "no." The TCPA was clearly designed, and is jurisdictionally limited to, reaching the actual users of the telephone equipment, and not a seller or other third party who does not use telephone equipment or initiate calls.[2]

A. The Breadth of the Question Presented

As a threshold matter, it is important to acknowledge the breadth of the question presented. The "entity that markets the seller's goods or services"[3] referenced in the question is not limited to an entity hired by a company solely to perform telemarketing activities on behalf of that company (such as where the company is out-sourcing telemarketing activities). Rather, the third-party entity referenced in the question could include any independent business or person (such as a retail store) so long as it is merely authorized to market and sell another

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and the Petition Filed by DISH Network, LLC for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules, CG Docket No. 11-50, DA 11-694 (rel. Apr. 4, 2011).

2 The scope of a common carrier's liability for acts of its agents under Section 217 of the Communications Act is not implicated by the facts of the petitions in this docket. 47 U.S.C. § 217.

3 The regulations define the term "seller" as "the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 C.F.R. § 64.1200(f)(7). This definition builds in the assumption that a telemarketing call is made on behalf of the seller. DISH disputes that it is a "seller" with respect to telemarketing calls made on behalf of a third party retailer who is authorized to sell DISH products and services. Rather, the retailer in that instance is the "seller."

company's goods or services. This would include, as noted, a retail store, as well as an entity that sells by catalog, direct mail, on an internet site or using the phone.

The breadth of the question presented implicates not only the example presented in the Petitions regarding DISH and independent retailers who sell DISH products and services (and may also sell other companies' products and services), but also implicates big box stores and national retailers (such as Best Buy, Sears, etc.) who sell numerous manufacturers' products (such as Sony televisions, Whirlpool appliances, etc.) Thus, in answering the question presented, the FCC must determine whether it will interpret the TCPA, and the regulations promulgated thereunder, so as to create liability for a broad range of businesses including manufacturers such as Sony or Whirlpool, in the instance where a telephone call is made by a Best Buy or Sears sales person attempting to consummate a sale of those products.[4] Thus, the question includes: does the call made by the big box store employee that violated the TCPA or the FCC's regulations create liability for the business whose brand is on the product being sold, including but not limited to the product manufacturer (*e.g.*, Sony and Whirlpool), even where the business did not use the telephone or otherwise direct and control the big box store salesperson to place such calls? To answer this question in the affirmative would create an extensive chain of liability that defies the language and jurisdictional reach of the statute and regulations themselves, as well as Congress's intent in enacting the TCPA and delegating rulemaking to the FCC. Further, it would also defy common sense and be wholly impractical.[5]

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4 Further to n. 3 above, it is DISH's position that in this example, Best Buy or Sears would be the "seller," as defined by the TCPA – not Sony or Whirlpool.

5 *See* Improving Regulation and Regulatory Review – Executive Order, Jan. 18, 2011 (nation's regulatory system must "promot[ing] economic growth, innovation, competitiveness and job creation" by using "the best, most innovative, and least burdensome tools" available); http://www.whitehouse.gov/the-press-

B. Background Regarding The TCPA And The FCC's Regulations

1. TCPA And Its Legislative History

The TCPA constitutes a single section (Section 227) of the Federal Communications Act of 1934, as amended (the "Communications Act"), and it is found within Title II that governs common carriers and users of telephone equipment. Congress enacted Section 227 "to protect the privacy rights of citizens by restricting ***the use*** of the telephone network for unsolicited advertising."[6]

The TCPA is primarily designed to protect consumers from receiving unsolicited telemarketing calls and/or messages by prohibiting certain conduct by users of telephone equipment.[7] In particular, the TCPA, among other things, prohibits the ***use*** of automated telephone equipment in certain circumstances,[8] imposes technical and procedural standards on the ***users*** of certain communications equipment,[9] and prohibits the provision of inaccurate caller identification information.[10] In addition, the TCPA authorized the FCC to enact certain regulations to, among other things, create a national do-not-call database, and specifically, to "prohibit any person from ***making*** or ***transmitting*** a telephone solicitation to the telephone

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office/2011/01/18/improving-regulation-and-regulatory-review-executive-order; *See* Prepared Remarks of Chairman Julius Genachowski, Broadband Acceleration Conference, at 4, Feb. 9, 2011 (agency should "remove barriers that are needlessly hurting businesses and our economy") http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0209/DOC-304571A1.pdf.

6 *In the Matter of Consumer.Net v. AT&T Corp.*, 15 FCC Rcd 281, 282 (1999) (emphasis added).

7 47 U.S.C. § 227.

8 47 U.S.C. § 227(b).

9 47 U.S.C. § 227(b)(1).

10 47 U.S.C. § 227(e).

number of any subscriber included in such database."[11] The TCPA also creates private rights of action for consumers,[12] and rights of action for the States, for violations of the TCPA and/or violations of the regulations promulgated by the FCC thereunder.[13]

One need look no further than the language of Section 227 itself to understand that Congress intended the TCPA, and the regulations promulgated thereunder, to reach the activities of the actual users of telephone equipment (and in some instances, common carriers). The title of Section 227 of the Communications Act, "Restrictions on use of telephone equipment," confirms this targeted focus.[14] In addition, the subsections of the TCPA prohibiting certain actions are directed at the persons or entities who ***initiate*** or ***make*** a prohibited telephone call.[15] Likewise, where Congress authorized the FCC to promulgate certain regulations under the TCPA, Congress specified that such regulation was to be directed at persons who make or transmit telephone solicitations.[16]

Fostering the above analysis is the legislative history of the TCPA. It demonstrates that Congress intended to govern the actual users of the telephone equipment – the telemarketers. Indeed, a Senate Report that is part of the TCPA's legislative history repeatedly refers only to the regulation of the conduct of telemarketers. In the paragraphs regarding the impact of the TCPA, that Report states that:

> This bill, as reported imposes a limited regulatory burden on some equipment manufacturers and some ***telemarketers***. As a result of

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11 47 U.S.C. § 227(c)(3)(F) (emphasis added).

12 47 U.S.C. § 227(b)(3); 47 U.S.C. § 227(c)(5).

13 47 U.S.C. § 227(g)(1).

14 47 U.S.C. § 227.

15 47 USC § 227(b)(1)(B); 47 U.S.C. § 227(d)(1)(A).

16 47 U.S.C. § 227(c)(3)(F).

> this legislation, ***telemarketers*** must obtain the express consent of any residential telephone subscriber before placing an automated telephone call to that subscriber (unless the call is made for emergency purposes.) . . . ***Telemarketers*** also will be required to ensure that they do not place automated calls to residential customers, to emergency lines, or to cellular or paging numbers. . . . In addition, automated telephone equipment manufacturers must ensure that their equipment disconnects the called party's line within 5 seconds of the time the equipment is notified that the called party has hung up the telephone.
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> The reported bill may have a minimal economic impact on the ***telemarketing industry***. The bill prohibits ***telemarketers*** from using artificial or prerecorded voice messages to residential consumers without the prior express consent of the recipient of the call. As noted previously, however, most ***telemarketers*** do not place unsolicited telephone calls to residential customers using artificial or prerecorded messages. Further, this legislation continues to permit ***telemarketers*** to contact potential customers using "live" persons to place telephone calls, to call business customers through artificial or prerecorded voice messages, or to engage in any other method of advertising. The fact that the major ***telemarketers*** do not oppose this legislation further reflect the view that the potential economic impact on ***telemarketers***, if any, will be small.[17]

Similarly, a House Report that is part of the TCPA legislative history confirms that the TCPA was designed "to regulate ***the use*** of telephones in making commercial solicitations."[18] That Report also repeatedly references the regulation of the conduct of telemarketers – *i.e.*, those who actually place the offending calls. Tellingly, with respect to the provisions of the TCPA that authorized the FCC to enact regulations to create a national-do-not

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17 S. Rep. No. 102-178 at *7-9 (1991), reprinted in 1991 U.S.C.C.A.N.1968 at 1975-76, 1991 WL 211220. "Committee reports are the most frequently cited and relied upon sources of legislative history, and in the Court's traditional view the most authoritative source." 2A *Sutherland Construction* § 48A:11 (6th ed. 2006).

18 H.R. Rep. 102-317, 1991 WL 245201.

call list, and "prohibit any person from ***making*** or ***transmitting*** a telephone solicitation to the telephone number of any subscriber included in such database," the Report states as follows:

> [i]n prohibiting any person from making or transmitting a telephone solicitation to any telephone number in the national database (Subsection c(3)(F)), ***the Committee intends to prevent businesses, and/or their telemarketing service agents from making unsolicited calls to residential subscribers*** who object to receiving telephone solicitations and have registered this objection by subscribing to the national database.
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> In requiring the FCC to specify the methods for recovering from persons accessing the database the developmental and operational costs involved (Subsection c(3)(H)), the Committee intends to place the primary financial burden on ***the businesses and service agencies that engage in telemarketing***.[19]

As reflected above, the intent of Congress was to govern the conduct of those who actually made or transmitted the unlawful call – the business itself placing the unlawful calls, or a telemarketing service that places the unlawful calls. There is no basis in the TCPA's legislative history to find liability for a business that did not actually make or transmit the allegedly offending telephone call.

Indeed, all of the liability-creating and conduct-prohibiting sections of the TCPA target the conduct of the users of telephone equipment. There is no section of the TCPA that uses the phrase "on behalf of" to create liability for the conduct of non-telephone users.[20] The absence of language broadening the scope of entities who can be held legally responsible under the Act is telling. The only section of the TCPA that uses the phrase "on behalf of" pertains to

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19 *Id.* at *23-24.

20 47 U.S.C. § 227.

the creation of a private right of action for persons who have received illegal telephone calls.[21] Specifically, 47 U.S.C. § 227(c)(5) states that:

> A person who has received more than one telephone call within any 12-month period ***by or on behalf of the same entity*** in violation of the regulations prescribed under this subsection may, [bring a private right of action].[22]

Thus, this section merely describes the fact of the call, it could be by a business or a telemarketer calling on someone's behalf, but does not define who is liable for the call. This single reference in an enabling part of the statute does not serve as a basis to create the sweeping liability advocated by the Government Movants and Charvat. Rather, it, along with the TCPA's legislative history (which focuses on those who actually made or transmitted the unlawful call), confirms that Congress did not intend to create liability for non-users of telephone equipment. Congress's intent to limit Section 227 to an actual user of telephone equipment is confirmed by the lack of "on behalf of" language in the other provisions of the TCPA. As the Supreme Court has directed, "'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.'"[23]

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21 47 U.S.C. § 227(c)(5).

22 *Id.* (emphasis added). This section is simply an enabling section – it does not create "on behalf" liability.

23 *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal citation omitted). *See also Int'l Sci. & Tech. Inst., Inc. v. Inacom Comm., Inc.*, 106 F.3d 1146, 1152 (4th Cir. 1997) ("We find it significant that in enacting the TCPA, Congress wrote precisely, making jurisdictional distinctions in the very same section of the Act by providing that private actions may be brought in appropriate state courts and that actions by the states must be brought in the federal courts.").

2. The FCC Regulations

As set forth above, in the TCPA, Congress tasked the FCC with promulgating regulations to implement the requirements of the TCPA and to, if it chose, create a national do-no-call database and prohibit persons from making telemarketing calls to telephone numbers included in the database. Those regulations, which are found at 47 C.F.R. § 64.1200, also only create liability for a person or entity who "***initiate[s]***" an offending call. Specifically, Section 64.1200(a) makes it unlawful for a person or entity to "***initiate*** any telephone call" using an automatic dialing system or an artificial or prerecorded voice to certain types of telephone numbers or unless certain requirements were satisfied.[24] Likewise, 64.1200(c) and (d) make it unlawful for a person or entity to "***initiate***" telephone solicitations to residential subscribers during certain hours, or who registered his or her number on the national-do-not call registry (and do not fall within an exception).[25]

There are four instances where the phrase "on behalf of" appears in the FCC's regulations. Specifically, in 47 C.F.R. §§ 64.1200(a)(2)(v) and (a)(6)(ii), the regulations exempt calls "made by or on behalf of a tax-exempt nonprofit organization" from the prohibitions on using artificial or pre-recorded voices and call abandonment. Likewise 47 C.F.R. § 64.1200(f)(12)(iii) excepts from the definition of the term "telephone solicitation," a call made "by or on behalf of a tax-exempt nonprofit organization." The use of "on behalf of" in these sections makes sense to create an exemption not only for calls made by a nonprofit organization itself, but also to expand the immunity to a private, ***for-profit*** telemarketing agency who makes calls on behalf of such organization. Once again, Congress intended to reach the user of

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[24] 47 C.F.R. § 64.1200(a)(1).

[25] 47 C.F.R. §§ 64.1200(c) and (d).

telephone equipment. Moreover, as discussed below, the interpretation of this exemption effectuated a specific Congressional intent not to burden nonprofit organizations, and does not reflect on the question of the liability of other telemarketers.

The only other section that uses the phrase "on behalf of" is Section (d), which states that

> No person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity.[26]

Again, the prohibition is directed at the initiator of the call. If the Commission intended to reach a third party or a "seller," as defined in the regulations, for purposes of creating liability, it would have said so.

Other provisions of the regulations use the terms "on whose behalf," and show that the FCC intended to treat differently a person who initiates a call, and one on whose behalf a call is made. At least one of the regulations promulgated according to the TCPA actually uses the terms "on whose behalf" and "initiated" differently in the same sentence of the same regulatory subsection.[27] If the term "initiate" includes not only the person that directly places a prerecorded call, but also the person on whose behalf the call was placed, then the term "seller"

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26 47 C.F.R. § 64.1200(d).

27 *See* 47 C.F.R. § 64.1200(f)(7) (defining a "seller," in part, as "the person or entity *on whose behalf* a telephone call or message is *initiated.*") (emphasis added); *see also* 47 C.F.R. § 64.1200(d)(5) ("Affiliated persons or entities. In the absence of a specific request by the subscriber to the contrary, a residential sub-scriber's do-not-call request shall apply to *the particular business entity making the call (or on whose behalf a call is made)* . . . .") (emphasis added).

is redundant and superfluous to the term "telemarketer."[28] Certainly, the FCC has not engaged in redundant and superfluous drafting. Rather, it has followed Congress's intent and has correctly drawn a clear distinction between the person that "initiates" a call and the person "on whose behalf" the call was initiated. Consistent with the jurisdictional reach of and the authority conferred on the FCC by the TCPA, the FCC created liability for the initiator of the call, but not a seller or other party.

The FCC's regulatory history confirms that the regulations, consistent with the TCPA, were intended to regulate the persons or entities who make telephone calls, as reflected by the repeated references to telemarketers. For example, in the order adopting the TCPA rules, the FCC states that:

> To address the more prevalent use of predictive dialers, we have determined that a ***telemarketer*** may abandon no more than three percent of calls answered by a person and must deliver a prerecorded identification message when abandoning a call. The new rules will also require all ***companies conducting telemarketing*** to transmit caller identification (caller ID) information, when available, and prohibit them from blocking such information.
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> Pursuant to our authority under section 227(c), we adopt a national do-not-call registry that will provide residential consumers with a one-step option to prohibit unwanted telephone solicitations. This registry will be maintained by the FTC. Consistent with the FTC's determination, the national registry will become effective on October 1, 2003. Subject to certain exemptions discussed below, ***telemarketers*** will be prohibited from contacting those consumers that register their telephone numbers on the national list.[29]

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28 *See* 47 C.F.R. § 64.1200(f)(9) (defining a "telemarketer," in part, as "the person or entity that initiates a telephone call or message . . . .").

29 *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14017 & 14034 (2003).

The focus on "telemarketers" and "companies conducting telemarketing" (rather than "sellers") underscores that the regulations create liability only for the person or entity who makes or transmits the unlawful call.

C. A Call Placed By An Entity That Markets The Company's Goods Or Services Does Not, And Cannot, Qualify As A Call Made "On Behalf Of, And Initiated By" The Company

Realizing that the TCPA and regulations promulgated thereunder limit liability to persons or entities who "initiate" offending telephone calls, the Government Movants and Charvat argue that a company "initiates" a telephone call merely by authorizing another business or person to sell a product or service through any channel the business or person should choose, regardless of how close or distant the nexus between the two entities or persons may be with regard to the business relationship.[30] In other words, the Government Movants and Charvat interpret the verb "initiate" to somehow silently include "on behalf of" language. This argument – essentially one of strict liability – is not supported by the TCPA, its legislative history, the regulations promulgated pursuant to the TCPA, or their regulatory history.

Neither the TCPA nor the regulations promulgated thereunder define the term "initiate." As set forth above, however, the statutory and regulatory history confirm that Congress's and the FCC's intent were to reach the persons or entities that actually use the phone – the telemarketers.

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[30] *See Joint Petition Of Dish Network, LLC And The United States, The States Of California, Illinois, North Carolina, And Ohio For An Expedited Clarification Of And Declaratory Ruling On The Telephone Consumer Protection Act of 1991*; the *Petition Filed by Philip J. Charvat for Declaratory Ruling Concerning the Telephone Consumer Protect Act (TCPA) Rules; and the Petition Filed by DISH Network, LLC for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules*, CG Docket No. 11-50 (Mar. 31, 2011); *Petition Filed by Philip J. Charvat for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules*, CG Docket No. 11-50 (Mar. 2, 2011).

The Government Movants and Charvat essentially take the position that the verb "initiates" would trigger liability for a party that merely authorized another business or person to sell their products or services in general and that other business or person, in turn, decided to use telemarketing and violated the TCPA.[31] The regulations' own definitions, however, do not support this position. Indeed, the regulation defines "telemarketer" as "the person or entity that ***initiates*** a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person."[32] In this instance, the FCC clearly uses the term "initiate" to identify the person or entity who actually makes a telephone call for a sales purpose, as opposed to a "seller" who hires an employee or third party for the specific purpose of initiating telephone calls to sell their product.[33]

Similarly, the regulations define the term "telemarketing" as "the ***initiation*** of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person."[34] Again, this definition uses the verb "initiate" to address the actual making of a telephone call – not merely authorizing a third party or person to independently sell products or services on their own accord who may or may not make telephone calls for sales purposes.

As set forth above, the regulations' use of the term "seller" and phrases "on behalf of" or "on whose behalf" in certain parts of the regulations but not others shows that the FCC intended to treat differently a person who initiates a call, a seller and/or one "on whose behalf" a

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31 *See supra* n. 30.

32 47 C.F.R. § 64.1200(f)(9).

33 The FCC noted that a "telemarketer" and "seller" may be the same or a separate entity. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991*, 18 FCC Rcd 14014, n. 103 (2003).

34 47 C.F.R. § 64.1200(f)(10).

call is made. If the term "initiate" includes not only the person that directly places a call, but also the person on whose behalf the call was placed, then the term "seller" is redundant and superfluous to the term "telemarketer."[35]

Courts specifically addressing the meaning of the verb "initiate" as used in the TCPA and the regulations promulgated thereunder have rejected the argument proffered by the Government Movants and Charvat. For example, in *Applestein v. Fairfield Resorts,*[36] the court rejected that an entity that authorizes another party to market its product can be deemed to have initiated calls made by the other party. Specifically, the court in *Applestein* held:

> Congress enacted the TCPA in 1991 "'to protect the privacy rights of citizens by restricting the use of the telephone network for unsolicited advertising.'" *Worsham v. Nationwide Ins. Co.*, 138 Md.App. 487, 493, 772 A.2d 868 (*quoting In the Matter of Consumer.Net v. AT&T Corp.*, 15 FCC Rcd 281, 282 (1999)), *cert. denied* 365 Md. 268, 778 A.2d 383 (2001). Specifically, Section 227(b)(1)(B) of the TCPA, in relevant part, makes it unlawful for any person "to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party[.]" Section 227(b)(3)(B) then grants a private right of action to a "person or entity" who may bring "an action to recover for actual monetary loss from [a violation of this subsection or the regulations prescribed under this subsection], or to receive $500 in damages for each such violation, whichever is greater[.]"
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> Neither the statute nor the regulations prescribed thereunder have defined "initiate" under Section 227(b)(1)(B) of the TCPA. In providing meaning to this term, we must construe it in its "ordinary and natural meaning [ ]." *United States v. Herrera*, 29 F. Supp. 2d 756, 760 (N.D. Tx. 1998) (quotation omitted). We need look no further than to the common dictionary meaning of "initiate" to interpret this term. "Initiate" means to "to begin or to set going ... originate." Webster's Third New International Dictionary of the English Language, Unabridged 1164 (1986).

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35 *See* 47 C.F.R. § 64.1200(f)(9) (defining a "telemarketer," in part, as "the person or entity that initiates a telephone call or message . . . .").

36 No. 0004, 2009 WL 5604429 (Md. App. July 8, 2009).

> In the case *sub judice*, the trial court found that Fairfield did not "initiate" the calls at issue, because "[c]learly, [Tele-Max] made the calls, not Fairfield." The evidence amply supports this finding. Under the Marketing Agreement, Tele-Max was responsible for making calls to identify persons who would be interested in touring a Fairfield facility. Tele-Max was also the registered subscriber of the telephone number included in the calls received by Applestein.[37]

Likewise, in *Charvat v. EchoStar Satellite, LLC*,[38] the District Court found that DISH had not "initiated" the telephone calls at issue, which were made by one of the thousands of third party retailers who are authorized to sell DISH's products and services. Rather, "each telemarketing call was 'initiated' by one of the Retailers."[39] Indeed, in *Charvat* – there being no meaningful dispute that DISH did not "initiate" the calls in question – the Court questioned whether DISH exercised sufficient control over the retailers to create vicarious liability. The Court answered this question in the negative. If the *Charvat* Court had found that DISH had "initiated" the telephone marketing calls in question, it would have been incumbent upon the Court to find DISH liable for a TCPA violation. The Court did not do so, but instead, granted summary judgment in favor of DISH. On appeal, and despite the fact that the Court of Appeals for the Sixth Circuit referred to the FCC certain questions regarding the existence or non-existence of vicarious liability under the TCPA, the Sixth Circuit did not take issue with the fact that DISH did not initiate the telephone calls at issue.

Neither the Government Movants, nor Charvat, cite any authority that addresses the meaning of the verb "initiate." Rather, the Government Movants cite to the decisions in

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37 *Id.* at *5.

38 676 F. Supp. 2d 668 (S.D. Ohio 2009) (appeal pending).

39 *Id.* at 674.

United States v. Dish Network, LLC,[40] and *Hooters of Augusta, Inc. v. Nicholson*,[41] but neither of those decisions address the term "initiate." Moreover, the District Court's decision in *Dish Network, LLC* merely found that the plaintiffs' Complaint satisfied the pleading standards of Fed. R. Civ. P. 12, and did not find that DISH was or could be liable for calls that it did not initiate.

D. The Other Authority Relied Upon By The Government Movants And Charvat Does Not Support Their Position

In an attempt to support their position, the Government Movants and Charvat both rely upon the FCC's Memorandum Opinion and Order in *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*,[42] (hereinafter "1995 Order"), claiming that the FCC explained that "[c]alls placed by an agent of a telemarketer are treated as if the telemarketer itself placed the call." The FCC's Statement in the 1995 Order was made in the context of interpreting the narrow exemption for non-profit entities (specifically, when non-profit entities hire a third party to conduct fundraising), and not in interpreting liability in general for any person with a nexus to telemarketing.[43] The 1995 Order extended the nonprofit exemption to ***for-profit*** third parties that telemarket for the nonprofit in order to avoid a result that the nonprofit could place the call itself but would not be able to contract with third parties for telemarketing. This isolated FCC statement made in a one-paragraph interpretation of a non-profit exemption, which is *dicta,* cannot be interpreted as broadly as proposed by the

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40 667 F. Supp. 2d 952, 963 (C.D. Ill. 2009).

41 537 S.E.2d 468, 472 (Ga. Ct. App. 2000).

42 10 FCC Rcd 12391, 12397, ¶13 (1995).

43 *Id.*

Government Movants and Chavat because to do so would contradict the plain meaning and jurisdictional reach of the TCPA and the Communications Act.

The Government Movants' and Charvat's reliance on an out-of-context statement made in the *Request of State Farm Mut. Auto. Ins. Co. for Clarification & Declaratory Ruling*, Declaratory Ruling,[44] (hereinafter "*2005 State Farm Ruling*"), and statements made in the Amicus Brief filed by the FCC in *Charvat v. Echostar Satellite*,[45] should likewise be rejected. With respect to the *2005 State Farm Ruling*, State Farm's Petition requested a determination that State Farm's "exclusive agents," who were admitted users of telephone equipment who initiated telephone calls, were permitted to rely upon the "established business relationship" (EBR) exemption of TCPA. The FCC's Consumer & Governmental Affairs Bureau granted State Farm's Petition, finding that, on its facts, the State Farm exclusive agents perform the same functions that employees of other companies perform.[46] After making this ruling, the Bureau "[took] this opportunity" to make an additional statement regarding the purported reach of the TCPA and its regulations which is now relied upon by the Government Movants and Charvat. This statement clearly is *dicta* and does nothing more than cite the 1995 Order, which, as explained above, does not address the factual situation at bar either.[47] Neither the statement made in the *2005 State Farm Ruling*, nor the statements made in the FCC's Amicus brief, can be

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44 20 FCC Rcd 13664, 13667, ¶7 (Cons. & Gov't Affairs Bur. 2005).

45 630 F.3d 459 (6th Cir. 2010)

46 *2005 State Farm Ruling*, 20 FCC Rcd at 13667, ¶6 ("State Farm's exclusive agents perform the same services for State Farm as employees of companies that 'in-source' customer service functions").

47 Further, the Bureau is without authority to make pronouncements on questions not previously addressed by the Commission itself. *See* 47 C.F.R. § 0.361(c) (Bureau shall refer to the Commission on "[m]atters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines").

used to modify the reach of the TCPA or provide for liability where none is created by the statute or regulations themselves.[48]

Indeed, courts regularly hold that an administrative or informal statement made by an agency cannot change the meaning of a regulation.[49] Specifically, an agency "may for good cause, change the regulation and even its interpretation of the statute through notice and comment rulemaking, but it may not constructively rewrite the regulation, which was expressly based upon a specific interpretation of the statute, through internal memoranda or guidance directives that incorporate a totally different interpretation and effect a totally different result."[50] Here, the position advocated by the Government Movants and Charvat would effect a completely different result than the express language of the TCPA and its regulations permit. The Commission should decline the invitation to expand the reach of the TCPA beyond that which was contemplated by Congress in enacting the TCPA, and this Commission when it enacted the regulations.

In sum, in response to the *Public Notice's* first question, the Commission should find that a call placed by an entity that merely markets a sellers' goods or services does not

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48 Similarly, the decision *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, CG 02-278, 23 FCC Rcd 559, at ¶10 (Jan. 4, 2008) (the "ACA Ruling"), is also unavailing. There, the FCC was responding to a specific request by ACA to clarify that autodialed and prerecorded message calls to wireless numbers that are provided by the called party to a creditor in connection with an existing debt are permissible as calls made with the "prior express consent" of the called party. That issue is not before the FCC in this matter. The referenced portion of ACA, by *Charvat* clearly addresses a different, specific issue (*i.e.*, debtors and creditors, perhaps in consonance with the Fair Debt Collections Practices Act, 15 U.S.C. § 1692 *et seq.*). Apparently recognizing the inapplicability of the ACA Ruling to the issues before the FCC (and before the 6th Circuit Court of Appeals in the referring litigation), the FCC did not even cite the ACA Ruling in its own amicus brief before the court.

49 *Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan,* 979 F.2d 227, 236 (D.C. Cir. 1992).

50 *Id.*

qualify as a call made on behalf of and initiated by a seller. In the event that the Commission reaches this conclusion, which it should, it need not address the second question presented.

II. EVEN IF THE TCPA PERMITTED "ON BEHALF OF" LIABILITY FOR A SELLER, A SELLER CAN ONLY BE RESPONSIBLE FOR THOSE IT DIRECTS AND CONTROLS

The second question that FCC requests comment on, assuming the TCPA provides for some type of indirect liability (which it does not), is what standard should be used to determine whether a telemarketing call is made "on behalf of" a seller, thus triggering liability for the seller under the TCPA. If the Commission concludes that the TCPA permits "on behalf of liability" (which it does not), the law is unequivocal that federal common law agency is the controlling standard for interpreting the scope of indirect liability under a federal statute that does not otherwise identify a different standard. Indeed, courts routinely apply federal common law agency principles in circumstances where a federal statute clearly intends for indirect liability (or extension of a privilege) within the context of a principal and its agent, but does not address the application of such indirect liability or rights. That is, once the threshold question of whether a federal statute, in fact, provides for this extension of liability or rights to a third person, the federal agency standard is required for determining if a statute applies based on the facts of the case, requiring proof of the alleged principal's direction and control of the alleged agent's violative conduct.

A. The Federal Common Law Of Agency Should Control

Put squarely: "[f]ederal common law controls with regard to federal claims," and under such agency rules, "a plaintiff seeking to demonstrate parent-subsidiary agency liability must show a manifestation by the principal that the agent shall act for him; that the agent has

accepted the undertaking; and that there is an understanding between the parties that the principal is to be in charge of the undertaking."[51]

In explaining how to apply the federal common law agency test, the Supreme Court has outlined the following factors:

> the hiring party's right to control the manner and means by which the product is accomplished . . . [;] [2] the skill required; [3] the source of the instrumentalities and tools; [4] the location of the work; [5] the duration of the relationship between the parties; [6] whether the hiring party has the right to assign additional projects to the hired party; [7] the extent of the hired party's discretion over when and how long to work; [8] the method of payment; [9] the hired party's role in hiring and paying assistants; [10] whether the work is part of the regular business of the hiring party; [11] whether the hiring party is in business; [12] the provision of employee benefits; and [13] the tax treatment of the hired party.[52]

Courts traditionally focus on the first prong of this analysis – controlling the manner and means of the agent's conduct – as the principal guidepost in applying the federal common law of agency to a particular set of facts.[53]

Applying federal common law agency principles, rather than crafting a standard anew from varying state laws (or, alternatively, from non-legal sources, such as dictionary definitions as proposed by the Government Movants in their Petition), is the correct approach so

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51 *Oracle Corp. v. SAP AG*, 734 F. Supp. 2d 956, 966 & 967 (N.D. Cal. 2010) (citing *Restatement (Third) of Agency*, § 2.03 (2006) and *Bowoto v. ChevronTexaco Corp.*, 312 F. Supp. 2d 1229, 1239-40 (N.D. Cal. 2004) ("plaintiff 'must' establish these elements")); *see also Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 622 F. Supp. 2d 890, 899 (N.D. Cal. 2009) (explaining that, "in the area of agency, it is federal common law that controls with respect to federal claims. . . ," and restating same test).

52 *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 750-51, 104 L. Ed. 2d 811, 109 S. Ct. 2166 (1989).

53 *See Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 114 (2d Cir. 2000).

that application of the federal statute remains uniform, regardless of where the case is brought. "'[F]ederal statutes are generally intended to have uniform nationwide application.'"[54] It is for this reason that federal law should govern questions involving the interpretation of the TCPA and its regulations.

B. There Is No Support For Simply Adopting A Dictionary Definition For Determining Civil Liability

Indeed, we are aware of no applicable cases that support interpretation of a federal statute to provide for indirect liability or third party rights based simply on a dictionary definition of a phrase that appears nowhere in the statute's liability provisions (such as what the Government Movants propose here with a dictionary definition of "on behalf of"). Rather, in the many examples where courts have interpreted a federal statute to provide for indirect civil liability or extension of rights to persons, the federal common law of agency is routinely applied. The federal common law of agency is interpreted to require the plaintiff to prove, at a minimum, that the principal exerted direction and control over the agent with respect to the acts at issue for liability.

For example, in determining whether a company could be held liable for civil penalties and other relief for violations by the company's affiliates under the CAN-SPAM Act,[55] the court concluded that, before it could conclude whether indirect liability was warranted under the federal statute, the government plaintiff would first need to demonstrate to a trier of fact that

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54 *Community for Creative Non-Violence v. Reid*, 490 U.S. at 740 (quoting *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43, 104 L. Ed. 2d 29, 109 S. Ct. 1597, 1605 (1989)). *Nunez v. Monterey Peninsula Engineering*, 867 F. Supp. 895 (N.D. Cal. 1994) (concluding that the federal statute at issue required the interpretation and application of federal common law).

55 15 U.S.C. § 7704(a) and (d); 16 C.F.R. § 316.4.

the company exerted sufficient knowledge and control over the affiliates' violative conduct; namely, a sufficient showing that the company controlled the affiliates' actions, and was knowingly procuring the violative activity or consciously avoided such knowledge.[56]

This same analysis – essentially directing and controlling the third party's conduct – has been found in numerous other cases applying federal statutes.[57] Indeed, even in determining whether, as a matter of evidence, a statement by another can be used against a party (let alone liability for civil monetary and punitive damages, such as at issue here), courts require that the standards set forth under the federal common law of agency be applied, with proof that the principal exercised significant control over the agent.[58] Specifically, under Federal Rules of Evid. 801(d)(2)(D), there is an exception to the hearsay rule for certain vicarious admissions where "[t]he statement is offered against a party" and is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship."

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56 *See United States v. Cyberheat*, No. CV-05-457, 2007 WL 686678, at *12-14 (D. Ariz. Mar. 2, 2007).

57 *See, e.g., Moriarty v. Glueckert Funeral Home*, 155 F.3d 859 (7th Cir. 1998) (applying federal common agency law principles in interpreting whether, based on the actions of another, an entity was bound by the Labor Management Relations Act, 29 U.S.C. § 185, and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132) (citing *Sullivan v. Cox*, 78 F.3d 322, 326 (7th Cir. 1996) ("Courts must therefore fashion federal common law to govern ERISA suits in an effort to promote uniformity, turning to state law only when consistent with the policies underlying ERISA.")); *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 114 (2d Cir. 2000) (applying federal common law agency principles in determining whether an employer was liable for discrimination against a worker under 42 U.S.C. §§ 2000e-2, and emphasizing that the analysis principally focuses on the extent to which the hiring party controls the manner and means by which the worker completes her assigned tasks).

58 *See Gomez v. Rivera Rodriguez*, 344 F.3d 103, 116 (1st Cir. 2003).

Courts have interpreted this rule to require that the party "establish, by a preponderance of the evidence, (1) that an agency relationship existed; (2) that the statements were made during the course of the relationship; and (3) that the statements relate to matters within the scope of the agency."[59] And because "agency" is not defined under the rule, courts have interpreted such agency principles to require proof of "continuous supervisory control" over the other, and have rejected statements as hearsay where the statement at issue was from a third party merely functioning as "an independent contractor" and control and direction could not be established.[60]

C. The Government Movants Have Proffered No Standard At All

The well-established principles of the federal common law of agency are in sharp contrast to how the Government Movants have proposed that the Commission interpret and apply indirect liability under the TCPA. Rather than focus on the actual statutory language of the TCPA, and how courts interpret indirect liability under a federal statute, the Government Movants recommend that the principal source for the FCC's interpretation of the TCPA should be to simply adopt "dictionary definitions of 'on behalf of'" as "in the interest of," "as a representative of," or "for the benefit of," regardless of how (or the absence of how) the "on

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59 *Gomez*, 344 F.3d at 116 (citing *Larch v. Mansfield Mun. Elec. Dep't*, 272 F.3d 63, 72 (1st Cir. 2001)).

60 *See Lippay v. Christos*, 996 F.2d 1490, 1499 (3d Cir. 1993) (finding that government informant's statement could not be imputed to the Bureau of Narcotics Investigation given that he functioned as a type of "independent contractor" to the Bureau, and was not an employee); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1440 (9th Cir. 1990) (holding that the proponent of the evidence had the burden to demonstrate that the purported insurance agents' statements "concerned a matter within the scope of the agency," and that [the proponent] failed to make this showing because "[h]e did not establish that the insurance agents and the district manager were 'agents' of [the defendant], as opposed to independent contractors.") (citing *Oki America, Inc. v. Microtech Int'l, Inc.*, 872 F.2d 312, 314 (9th Cir. 1989)).

behalf of" clause appears in the TCPA itself.[61] The Government Movants would have this Commission adopt a standard out of Webster's dictionary, rather than one that is well-founded and developed under the federal common law.[62]

Other than reliance on a dictionary definition to support this proposal, the Government Movants reference one case in which the clause "on behalf of" is used in a federal sentencing guideline provision and where the guidelines' explanatory notes elaborate with multiple examples on how the term should be applied in *United States v. Frazier*.[63] The case provides no comparable analogy to the instant issue of the TCPA, which does not reference "on behalf of" in the liability provisions.

The second case that the Government Movants reference, *Craven v. United States*, likewise does not involve interpretation of indirect liability under a federal statute, but rather focuses on whether a stock transfer incidental to a divorce decree was taxable under an IRS temporary regulation, in which (as with the sentencing guidelines example) a detailed explanation and examples were provided as to how one's actions for a spouse were to be applied by the regulation.[64] And, in *United States v. Dish Network, LLC*,[65] the last case relied upon by

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61 *See Joint Petition of Dish Network, LLC And The United States, The States Of California, Illinois, North Carolina, And Ohio For An Expedited Clarification Of And Declaratory Ruling On The Telephone Consumer Protection Act of 1991*, CG Docket No. 11-50, (Mar. 31, 2011), at 24 (States' Portion of the Joint Petition, citing Merriam-Webster's Collegiate Dictionary 103 (10th ed. 1999)).

62 The Commission would take the Government Movants' suggestion at its peril. The FCC previously has been admonished for relying upon the "wooden use" of a dictionary to resolve questions of statutory interpretation. *See Alarm Industry Communications Committee v. FCC*, 131 F.3d 1066, 1070 (D.C. Cir. 1997) (noting that the statutory provision "presents a puzzle, and [] the wooden use of a dictionary cannot solve it").

63 53 F.3d 1105, 1112 (10th Cir. 1995).

64 215 F.3d 1201, 1207 (11th Cir. 2000).

65 667 F. Supp. 2d at 963.

the Government Movants, the court did not analyze the TCPA statute, but instead just referenced the language in the FCC's regulations and posited that enough was alleged in the Complaint to survive a motion to dismiss. The absence of analysis in that opinion on what standard should be applied and why in determining the application, if any, of indirect liability leaves it of little value to the instant proceeding.[66]

At bottom, the few cases cited by the Government Movants to support their expansive argument that the FCC adopt a dictionary (and effectively strict liability) definition of "on behalf of" language do not lend support. And in no way do they provide a justifiable foundation for the FCC to depart from well-established law on the standard for interpreting a federal statute to create indirect liability, particularly where extensive civil monetary and punitive damages are at stake.

D. Federal Common Law Agency Principles Require An Analysis Demonstrating Significant Direction and Control as to the Violative Telemarketing Conduct

The more reasoned approach – consistent with how federal courts approach this issue in countless cases involving interpretation of a federal statute's liability provisions – is to apply the federal common law of agency principles to determine if the alleged principal directed and controlled the purported agent's violative conduct. In other words, the standard for determining indirect liability under the TCPA and its regulations should consider (a) whether the principal business controlled the manner and means by which another person or entity initiated

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66 The only other case cited by the States, *Hooters of Augusta, Inc. v. Nicholson*, 245 Ga. App. 363, 367 (Ga. Ct. App. 2000), conflicts with the Government Movants' argument here, given that the state court's application in that case resulted in application of a rigorous agency standard (*respondeat superior*); the court concluded that there was a jury question on whether the plaintiff could factually prove that the principal had the "right to control the means, method and manner of executing the work" at issue in the violations.

the telemarketing calls; (b) the source of the instrumentalities and tools used to place the violative telemarketing calls (i.e., how it did so); and (c) the relationship between the business and the entity that placed the violative calls, and extent of control by the principal over the entity placing the calls (i.e., facts that would help a court gauge direction and control over the efforts resulting in violative acts).[67]

CONCLUSION

The TCPA does not provide for broad "on behalf of" indirect liability. Rather, the TCPA was designed, and is jurisdictionally limited to, reaching the actual users of the telephone equipment. The liability provisions of the statute govern a business or person that places its own unlawful calls, or call centers that place the unlawful calls, but do not create liability for a business or person merely because they authorized an independent third party to generally market their products or services and that third party initiated an unlawful call. The Commission's implementing regulations likewise do not provide for the broad, unfettered indirect liability to any party that has a nexus (however close or distant) with another who violates the TCPA and its implementing regulations. Consistent with the jurisdictional reach of and the authority conferred on the FCC by the TCPA, the FCC focused liability on the initiator of the call. There is no basis – whether legal authority or common sense – to adopt the attenuated, unsupported, and impractical arguments suggested by the Government Movants and Chavat.

With respect to the second question that the FCC requested comment on, if the Commission concludes that the TCPA permits some type of indirect liability (which it does not), the federal common law of agency is the controlling standard for interpreting the scope of such

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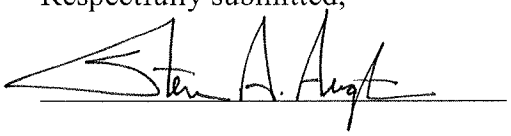
[67] *See Community for Creative Non-Violence v. Reid*, 490 U.S. at 740-41.

liability. This standard requires an analysis of whether the alleged principal directed and controlled the alleged agent's unlawful telemarketing. This standard is consistent with how courts routinely interpret federal statutes that clearly provide for indirect liability, but do not articulate a standard for applying such liability. Applying the federal common law of agency also would promote uniformity in the interpretation and application of the TCPA, both by the Commission and judiciary in matters involving the TCPA.

Respectfully submitted,



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